Journal of Contemporary Health Law & Policy (1985-2015)

Volume 8 | Issue 1 Article 11

1992

"That They May Thrive" Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumptions

Sanford N. Katz

"THAT THEY MAY THRIVE" GOAL OF CHILD CUSTODY: REFLECTIONS ON THE APPARENT EROSION OF THE TENDER YEARS PRESUMPTION AND THE EMERGENCE OF THE PRIMARY CARETAKER PRESUMPTION*

*Sanford N. Katz***

> And you who have heard the story of the chalk circle
> Bear in mind the wisdom of our fathers:
> Things should belong to those who do well by them
> Children to motherly women that they may thrive
> Wagons to good drivers that they may be well driven
> And the valley to those who water it, that it may bear fruit.[1]

In the climax to Bertolt Brecht's play, *The Caucasian Chalk Circle*, the judge listens to the arguments of two women who each want custody of the same child. One claimant is the governor's wife, the biological mother of the child; the other is Grusha, a maid. Over a year before, the governor's wife abandoned her son in an effort to save herself. Grusha rescued the child and cared for him tenderly. Now, the governor's wife returns and reclaims the child. Judge Azdak sets up a test to determine who should be awarded custody.

> AZDAK to Plaintiff and defendant: the court has heard your case, but has not yet ascertained who this child's real mother is. It is my duty as judge to pick a mother for the child. I'm going to give you a test. Shauva, take a piece of chalk. Draw a circle on the floor. (*Shauva draws a chalk circle on the floor*) Put the child in the circle! (*Shauva places Michael, who is smiling at Grusha, in the circle*) Plaintiff and defendant, stand just outside the circle, both of you! (*The governor's wife and Grusha step close to the circle*) Each of

---

* This Article is adapted from a lecture delivered on March 22, 1990 at the Columbus School of Law, The Catholic University of America, as part of the Brendan Brown Lecture Series. The lecture series honors Dr. Brendan Brown, the sixth dean of the Columbus School of Law (1942-54).

** Boston University, A.B.; University of Chicago, J.D.; Professor of Law, Boston College Law School.

1. 7 Bertolt Brecht, *The Caucasian Chalk Circle*, *in* COLLECTED PLAYS 229 (Ralph Manheim & John Willett eds., 1974).

you take the child by one hand. The true mother will have the strength to pull the child out of the circle.
THE SECOND LAWYER (*quickly*) High court of justice, I object to making the fate of the large Abashvili estates, which are entailed to the child as heir, hinge on the outcome of so dubious a contest. Furthermore, my client is not as strong as this person who is accustomed to physical labor.
AZDAK She looks well fed to me. Pull!
(*The governor's wife pulls the child out of the circle. Grusha has let go, she stands aghast*)
THE FIRST LAWYER (*congratulates the governor's wife*) What did I say? The ties of blood.
AZDAK (*to Grusha*) What's the matter with you? You didn't pull.
GRUSHA I didn't hold on to him. (*She runs to Azdak*) Your worship, I take back what I said against you, I beg your forgiveness. If only I could keep him until he knows all his words. He knows just a few.
AZDAK Don't try to influence the court! I bet you don't know more than twenty yourself. All right, I'll repeat the test to make sure.
(*Again the two women take their places*)
AZDAK Pull!
(*Again Grusha lets the child go*)
GRUSHA I raised him! Do you want me to tear him to pieces? I can't.
AZDAK (*stands up*) The court has now ascertained who the true mother is. (*To Grusha*) Take your child and clear out.[2]

Like the Biblical story of Solomon ordering a child to be cut in half in order to satisfy both claimants, the implied standard the judge used to decide which woman should be awarded custody is which woman loves the child so much that she would rather lose custody than injure him. A claimant's love for a child is certainly a critical factor in judicial decision-making about children, but it may be too simplistic to serve as the sole criterion. The court scene in *The Caucasian Chalk Circle* is dramatically effective; however, the argument is on a poetic level and does not recognize the unpalatable complexities of the human situation. Moreover, the scene's focus is entirely on the emotions of the contestants, ignoring those of the child.

I.

In divorce litigation, when an infant's custody is in dispute, a knowledge

2. *Id.* at 226-27.

of property and proprietary rights in English history must precede any understanding of the approach taken by judges and lawyers. For centuries, the common law did not recognize the autonomy of married women. Professor Lawrence Stone categorizes the inferior position of wives in the sixteenth century as one of "subordination."[3] He notes, "By marriage, the husband and wife became one person in law—and that person was the husband. He acquired absolute control of all his wife's personal property, which he could sell at will."[4] During the sixteenth and seventeenth centuries the ideal woman was described as "weak, submissive, charitable, virtuous and modest .... Her function was housekeeping, and the breeding and rearing of children. In her behaviour she was silent in church and in the home, and at all times submissive to men."[5]

This male domination of women and the control over their property continued into the nineteenth century. All authority rested with the husband and father.[6] It should not be surprising, then, that when separation or the limited divorce then available occurred,[7] there would be no question that the father had the absolute right to the custody and control of his children during their lives, and, upon their deaths, to the children's property. In their book, *Children in English Society*, Ivy Pinchbeck and Margaret Hewitt emphasize this absolute right:

> Even in deeds of legal separation, if the father voluntarily gave up his rights to his children, the courts held that such deeds were void in so far as they deprived the father of his powers over his children, or provided that the mother should have possession of them in exclusion of him. Indeed, the rights of the father as against the mother were so absolute that the courts did not in fact have the power to grant a right of access to her children to a mother whose husband had not granted it himself.[8]

So secure was the father-child relationship that even in cases of what today we might label as child abuse or neglect, intervention into that relationship was exceedingly rare, and termination of the father-child relationship even rarer.

---

3. LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800, at 195 (1977).

4. *Id.*

5. *Id.* at 198.

6. *Id.* at 667-69.

7. In 16th century England, only a limited divorce was available. It was not until 1857 that divorce, as we know it today, was available in England. For a history of the debate surrounding the implementation of modern English divorce law, see LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987, at 368-82 (1990).

8. 2 IVY PINCHBECK AND MARGARET HEWITT, CHILDREN IN ENGLISH SOCIETY 362-63 (1973).

It is against this background that the campaign in England for judicial reform in child custody legislation, which was led by Mrs. Caroline Norton and culminated in the passage of the Infants Custody Act of 1839, seems particularly heroic.[9] Mrs. Caroline Norton was a prominent London society hostess, author, and journalist. She married Richard Norton when she was nineteen; after having three children, she left her husband and took their children with her. Without notifying his wife, Mr. Norton, who had accused his wife of adultery (she was later acquitted of the charge), took the children from her care and refused to allow her to have any relationship with them. Deeply distressed by not being able to see or communicate with her children, Mrs. Norton wrote pamphlets in England about the plight of women in her situation. Two of the most notable were *The Natural Claim of a Mother to the Custody of her Child as Affected by the Common Law Rights of the Father* and *Illustrated by Cases of Peculiar Hardship and Separation of the Mother and Child by the Law of Custody of Infants Considered*, both of which appeared in 1837.[10]

Mrs. Norton found a champion in Serjeant Talfourd, who had introduced a child custody bill in 1838 which had passed the House of Commons in England, but had not passed the House of Lords. After another try the following year, both Houses passed the Custody of Infants Act. That Act read as follows:

> Whereas it is expedient to amend the Law relating to the Custody of Infants: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That after the passing of this Act it shall be lawful for the Lord Chancellor and the Master of the Rolls in *England*, and for the Lord Chancellor and the Master of the Rolls in *Ireland*, respectively, upon hearing the Petition of the Mother of any Infant or Infants being in the sole Custody or Control of the Father thereof or of any Person by his Authority, or of any Guardian after the Death of the Father, if he shall see fit, to make Order for the Access of the Petitioner to such Infant or Infants, at such Times and subject to such Regulations as he shall deem convenient and just; and if such Infant or Infants shall be within the Age of Seven Years, to make Order that such Infant or Infants shall be delivered to and remain in the Custody of the Petitioner until attaining such Age, subject to such Regulations as he shall deem convenient and just.
>
> . . . .

9. *Id.* at 371-76.
10. *Id.* at 373.

> IV. Provided always, and be it enacted, That no Order shall be made by virtue of this Act whereby any Mother against whom Adultery shall be established, by Judgment in an Action for Criminal Conversation at the Suit of her Husband, or by the Sentence of an Ecclesiastical Court, shall have the Custody of any Infant or Access to any Infant, any thing herein contained to the contrary notwithstanding.[11]

The Custody of Infants Act of 1839, passed by the British Parliament, is quoted at length because it is often heralded as being a victory for mothers, establishing the maternal preference rule, and giving rise to the tender years presumption, which is defined as the welfare of a child of tender years is best served by its being placed in the custody of its mother.[12] Pinchbeck and Hewitt, however, do not read the law so broadly.

> It could be said that the Act was not so much concerned with the welfare of the child as with the punishment of the mother proved "guilty" in separation or divorce proceedings .... But in 1839, the Custody of Infants Act constituted an immense and startling innovation: the absolute right of the father was now subject to the discretionary power of the judge .... Under the Act the practice of the courts was to decide if possible in favour of paternal right rather than against it, and to exercise discretion against the mother even as to young children. Nevertheless, despite its limitations, this piece of legislation has a special importance since it was the first statutory intervention in the common law rights of a father in this country.[13]

Thirty-four years later, the Custody of Infants Act of 1873 was passed by the British Parliament. That legislation extended the mother's rights to the custody of her children to age sixteen, despite proven adultery.

II.

In the United States, some states incorporated the tender years presumption into their child custody law by statute and by case law.[14] The presumption is rebuttable by proof of the mother's unfitness. In many instances,

---

11. An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict., ch. 54 (Eng).

12. Rosemary L. Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 335 (1982).

13. PINCHBECK & HEWITT, *supra* note 8, at 376.

14. For a collection of cases, see Thomas R. Trenkner, Annotation, *Modern Status of Maternal Preferences Rule or Presumption in Child Custody Cases*, 70 A.L.R.3D 262, 287-89 (1976). *See also* JOYCE H. GREEN ET AL., DISSOLUTION OF MARRIAGE 24 & n.70 (1986); Klaff, *supra* note 12, at 335 & n.3; Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 429-38 (1976-77).

proving unfitness turned into ugly battles between spouses. At first glance, the tender years presumption might appear to have been a method of protecting women's rights, but Professor Frances Olsen, suggesting that it was a societal statement about the role of women in the family, writes that the tender years "doctrine reinforced the ideology of inequality, which stated that a woman's place is in the home. The doctrine therefore helped to keep women in their place—that is, in the home serving others and not out in public gaining power or making money."[15] Although this may have been in the minds or subconsciousness of some legislators and judges, such a motive was not explicit. Courts justified their preference for awarding custody of infants to mothers with lofty generalizations, referring to motherhood as being "God's own institution for the rearing and upbringing of the child"[16] and declaring that the tender years doctrine either "arises out of the very nature and instincts of motherhood"[17] or is an "inexorable natural force."[18]

Coexisting with the tender years presumption in child custody laws was the doctrine of "the best interests of the child." If a case involved a child under the age of five and the state statute mandated, or case law adopted, the tender years presumption, the presumption would apply. In that case, there would be no need to use the best interests of the child doctrine. If the child was over the age of five, the child's best interests would apply without regard to the gender of the spouse; here, the mother might still be preferred, albeit under the guise of the best interests of the child doctrine.

The best interests of the child doctrine has been criticized as being vague. Because of its lack of a precise and uniform definition, it is argued that judges have an opportunity to use their own cultural values and rules of thumb to define and apply the standard.[19] Such an attack on the doctrine is summarized by Judge Gary Crippen, stating that the best interests standard "risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an

15. Frances E. Olsen, *The Politics of Family Law*, 2 LAW & INEQ. J. 1, 15 (1984).

16. Hines v. Hines, 185 N.W. 91, 92 (Iowa 1921).

17. Krieger v. Krieger, 81 P.2d 1081, 1083 (Idaho 1938).

18. Wojnarowicz v. Wojnarowicz, 137 A.2d 618, 620 (N.J. Super. Ct. Ch. Div 1958).

19. Elsewhere, Professor Walter O. Weyrauch and I have written:

> While it is true that the best-interests standard is indeterminate and speculative, actual adjudication poses fewer problems than is commonly assumed. In fact, the standard is not applied to bring about a result, but merely serves as a convenient and useful justification for a decision reached on another level. Decision makers often feel uncomfortable with sweeping discretionary powers unless they have worked out more specific guidelines for exercising this seemingly unlimited discretion.

WALTER O. WEYRAUCH & SANFORD N. KATZ, AMERICAN FAMILY LAW IN TRANSITION 506 (1983).

historic commitment to the rule of law."[20]

III.

For the past thirty years, there has been a movement by state legislatures to enact detailed child custody statutes that effectively limit judicial discretion when interpreting and applying the best interests of the child doctrine.[21] These statutes, promulgated through the political legislative process, set forth standards that must be enforced by judges. The Uniform Marriage and Divorce Act, a model proposal for many state statutes, enumerates factors for a judge to consider in a child custody dispute which focus mainly on the child, his wishes, and his relationships with others.[22] In contrast to this straightforward approach, some state statutes include elaborate schemes requiring lawyers to prepare detailed parenting plans.[23] To lawyers, the effect of such statutes has been to require thought, planning, and organization of evidence in the preparation of a child custody case. Consequently, child custody trials have become more orderly. Judges are required to review the parenting plans, make findings of fact, and write a well-reasoned decision relating the evidence to the statutory standards. These requirements have the positive result of minimizing or placing on record the expressions of bias. As such, the likelihood of a trial judge's decision being reversed on appeal for abuse of discretion or being unsupported by the facts is considerably diminished.[24]

---

20. Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499-500 (1990).

21. For a discussion of judicial discretion in family law decision-making, see Crippen, *supra* note 20, at 430-31.

22. Section 402 of the UNIFORM MARRIAGE & DIVORCE ACT reads:

> Section 402. [Best Interest of Child.] The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school, and community; and
>
> (5) the mental and physical health of all individuals involved.
>
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

23. *See, e.g.*, WASH. REV. CODE ANN. § 26.09.181 (West Supp. 1991).

24. In Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985), Judge Wahl wrote:

> The inherent imprecision heretofore present in our custody law has, in turn, diminished meaningful appellate review. We have repeatedly stressed the need for effective

Because of this case law and other relevant state statutes concerning child custody, lawyers negotiate settlements in custody cases. Most custody disputes are settled before they reach court and those that do reach court may be settled after a pretrial conference with the judge. Chief Justice Neely of the West Virginia Supreme Court of Appeals has provided additional reasons for such child custody settlements, based on the number of uncontested divorces:

> Over 90 percent of divorces are uncontested. This means that the granting of the divorce is *pro forma* and routine, with all of the important decisions made out of court—usually in law office negotiations. In the case of middle or upper income clients, failure to contest usually means a settlement has been reached.[25]

Others argue that most settlements result in the mothers receiving custody.[26] The reasons for this result are complicated. Perhaps such settlements are reached because lawyers, predicting what might occur at trial, urge the father-clients to agree to the mother having custody. A mother gaining custody in a settlement might mean that she bargained away personal advantages or gave up certain economic rights. Chief Justice Neely writes:

> These compromises [divorce settlements] are . . . approved by a judge, who generally gives them only the most perfunctory sort of review. The result is that parties (usually husbands) are free to use whatever leverage is available to obtain a favorable settlement. In practice this tends to mean that husbands will threaten custody fights, with all of the accompanying traumas and uncertainties discussed above, as a means of intimidating wives into accepting less child support and alimony than is sufficient to allow the mother to

---

> appellate review of family court decisions in our cases, and have required specificity in writing findings based on the statutory factors . . . . We are no less concerned that the legal conclusion reached on the basis of those findings be subject to effective review. We recognize the inherent difficulty of principled decision making in this area of the law. Legal rules governing custody awards have generally incorporated evaluations of parental fitness replete with ad hoc judgments on the beliefs, lifestyles, and perceived credibility of the proposed custodian . . . . It is in these circumstances that the need for effective appellate review is most necessary to ensure fairness to the parties and to maintain the legitimacy of judicial decision making.

Id. at 713 (citations omitted).

25. Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 173 n.11 (1984) (citation omitted).

26. For a discussion of negotiations in divorce, motivations for spouses in seeking or not seeking custody, and reasons for mothers remaining "the primary custodians of children following divorce," see generally Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?, in* DIVORCE REFORM AT THE CROSSROADS 37-74 (Steven D. Sugarman & Herma H. Kay eds., 1990).

> live and raise the children appropriately as a single parent. Because women are usually unwilling to accept even a minor risk of losing custody, such techniques are generally successful.[27]

There is also the possibility that a father believes having custody might limit his postdivorce life.

Through the years, a great deal of litigation has focused on whether a mother's or father's right of custody is greater. This has led ineluctably to the politicizing of the whole area of child custody.[28] Initially, arguments used to rebut the tender years presumption were based on the unfitness of the mother and the fitness of the father and the parties used psychological data, testimony of experts, and reports of everyday activities as evidence of such. However, the battle over parental rights has been part of the revolution in individual rights that has been occurring over the past thirty years in the United States.[29] With the rights revolution came new arguments made on an unemotional and legalistic level, focusing particularly on constitutional law and the language of constitutional litigation. Arguments were now based on the theory that applying the tender years presumption against a fit father was a violation of his right to equal protection of the law. In some states such arguments proved successful under certain circumstances. For example, the tender years presumption has been found by some state supreme courts to violate the state's Equal Rights Amendment.[30] Some state supreme courts have found the presumption to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[31] However, no case has yet been decided on this issue by the United States Supreme Court.

By the 1970s, the tender years presumption had apparently lost its overriding importance in child custody cases. The rights arguments had affected child custody legislation and court decisions. State statutes and judicial decisions were declaring that parents as custodians should be treated equally in these disputes. This was the period when *Beyond the Best Interests of the*

---

27. Neely, *supra* note 25, at 177.

28. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 786-849 (2d ed. 1988) (analyzing the legal theories of child custody and offering a wealth of information about the psychiatric and social science research on child custody that has been completed during the last decade and a half).

29. *See generally*, Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) (examining the evolving constitutional limits on family law, particularly emphasizing privacy rights into which the state should not intrude).

30. *See, e.g.*, Phillip E. Hassman, Annotation, *Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex*, 90 A.L.R.3D 158 (1979). For a discussion of legislative action in this area, see GREEN ET AL., *supra* note 14, at 253-54.

31. See CLARK, *supra* note 28, at 800 & n.22.

Child was published.[32] This work, based on psychoanalytic theory, had considerable influence not only on making that theory and certain psychological terminology a part of child custody laws, but also in changing the major focus in child custody disputes from the claimants to the child. The authors declared that when a divorce is contemplated, parents should make a sincere effort to solve the problems of child custody themselves, thereby placing a high premium on family privacy and autonomy. But when there are insoluble conflicts which the couple can not solve privately or through mediation, the couple must go to court. In such cases, the authors state that a judge ought to approach child custody disputes from the vantage of the needs of the child based on the child's particular age, attachments, and stage of development. Additionally, the judge should consider the adult who can satisfy those needs best.

Furthermore, the authors define the child as a unique person, rather than a miniature adult, who is dependent on the adult world and needs to be wanted, loved, nurtured, and protected. A child also needs stimulation and continuity of care in order to have a chance to develop into a healthy adult. The authors point out that a child's sense of time is different from that of an adult, and therefore, separations should be minimized while stability with an adult figure maximized. They emphasize that during much of a child's life, he is dependent on adults, not only for protection but also for physical and emotional developments, all of which are intimately connected.

It follows, then, that adults who can fulfill children's needs are not necessarily defined by gender or by biology. The authors introduce the concept of the psychological parent—a person who fulfills the child's needs as well as wants the child and values her as a person. The specific ideas synthesized in *Beyond the Best Interests of the Child* as summarized here are accepted today in one form or another by child development and mental health experts. The book and some of the concepts it has introduced into the law have been cited in some appellate court cases.[33]

IV.

The 1980s saw the emergence of the concept of the primary caretaker preference in child custody disputes—a concept which now seems to have

32. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

33. *See, e.g.*, David M. v. Margaret M., 385 S.E.2d 912, 916-17 & n.10 (W. Va. 1989); Fatemi v. Fatemi, 537 A.2d 840, 848 (Pa. Super Ct. 1988); Burchard v. Garay, 724 P.2d 486, 490-91 & n.6 (Cal. 1986); Pikula v. Pikula, 374 N.W.2d 705, 711 (Minn. 1985); Yontef v. Yontef, 440 A.2d 899, 904 (Conn. 1981); Felton v. Felton, 418 N.E.2d 606, 607 n.2 (Mass. 1981); Seymour v. Seymour, 433 A.2d 1005, 1008 (Conn. 1980).

captured the interest of family law scholars, judges, and law reformers.[34] The primary caretaker is defined as the person who, before the divorce, managed, monitored the day-to-day activities of the child, and met the child's basic needs including: feeding, clothing, bathing, and protecting the child's health. It is assumed that the primary caretaker will continue in that role after the divorce. The standard used in a custodial disposition, singles out continuity of care—a standard proposed by the authors of *Beyond the Best Interests of the Child*—to trump all others.[35]

Chief Justice Neely, a strong and forceful advocate of the primary caretaker rule, writes that such a rule spells "mother."[36] After reviewing the research in the field and using his own experience as a lawyer and judge, he concludes that mothers are "more likely than fathers to feel close to their children."[37] His major arguments supporting the primary caretaker presumption, however, are rooted in his mistrust of divorce negotiation, the divorce process itself, and the use of experts. He believes that if the presumption is established, the likelihood of using child custody litigation as a bargaining chip in negotiation is diminished. According to Chief Justice Neely, the presumption minimizes elaborate and time-consuming custody trials in which a costly battle of experts dominates the litigation and women are disadvantaged because they cannot finance such lengthy and complex litigation. He also believes that determining who is the primary caretaker is

34. *See, e.g.*, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 559 (1984); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 37 (1987); Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 773-74 (1988). *See generally* Crippen, *supra* note 20 (analyzing *Pikula* and the tension in child custody law between a need for predictable results and the freedom to consider variations in each family situation); Neely, *supra* note 25 (offering the primary caretaker parent rule as a solution to the current child-custody rules which work against the interests of the parents); Bruce Ziff, *The Primary Caretaker Presumption: Canadian Perspectives on an American Development*, 4 INT'L J. L. & FAM. 186 (1990) (expressing doubts about the effectiveness of the primary caretaker rule).

35. *See* GOLDSTEIN ET AL., *supra* note 32, at 31-34; *see also* JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 66-67 (1986).

36. Neely, *supra* note 25, at 180.

37. *Id.* at 171. Professor Olsen has written:

> Women argue that women's role as bearers of children gives them a greater interest than men in the welfare of children. Perhaps or perhaps not. The cultural meaning of pregnancy and childbirth, not the simple biological fact, is the crucial issue. In any event, women's role as primary caretakers alone is certainly sufficient to explain the greater stake women seem to have in children.

Frances E. Olsen, Children's Rights: Some Feminist Approaches with Special Reference to the United States Convention on the Rights of the Child 51 n.3 (Oct. 1991) (unpublished manuscript on file with the author).

a simpler task than delving into the elaborate factors used to determine who was, and will be, a good parent. For him, the answer is basic: the mother.

Professor Bruce Ziff has challenged the primary caretaker presumption by asking some critical questions. Why should the primary caretaker presumption be considered the exclusive reliable means of choosing a custodian? In other words, is past conduct—maintaining and monitoring day-to-day activities of the child—the only true test for choosing who should be the child's custodian? Is there a rational connection between this presumption and the nurturing activities of the custodian? Does the presumption emphasize quantity of care at the expense of its quality? Does "primary caretaker" define the strongest bond between parent and child? Will the presumption really deter litigation and promote more fair negotiations between parents? If the presumption is established and known, will it promote coparenting—a desirable social goal? Since more parents are now both working outside the home and utilizing various forms of day care, does this pose difficulties in identifying the primary caretaker? Moreover, with the current economic situation—particularly the rise in unemployment—causing changes in parental roles, will the primary caretaker necessarily be the mother?[38] In order to best answer any of Professor Ziff's important questions, the judge must make an inquiry into the particular facts of the case and examine the quality of the parent-child relationship.

The emergence of the primary caretaker presumption, focusing custody disputes on custodians rather than on the child, fuels political fires by declaring, even before a case is heard, that one parent has the advantage. If that parent is the mother, Professors Clark and Glowinsky ask whether the primary caretaker presumption is "a thinly disguised form of the tender years doctrine."[39] If this is the case, will we see a return to the ugly disputes

38. These questions are thoroughly critiqued in Ziff, *supra* note 34. For a full exploration of the arguments for and against the primary caretaker preference, including case law and statutes, see Crippen, *supra* note 20.

39. HOMER H. CLARK, JR. & CAROL GLOWINSKY, CASES AND PROBLEMS ON DOMESTIC RELATIONS 1075 (4th ed. 1990). Justice Wahl answered this question in the negative. Writing in Pikula v. Pikula, 374 N.W.2d 705, 712 n.2 (Minn. 1985), he said:

> The primary parent preference, while in accord with the tender years doctrine insofar as the two rules recognize the importance of the bond formed between a primary parent and a child, differs from the tender years doctrine in significant respects. Most importantly, the primary parent rule is gender neutral. Either parent may be the primary parent; the rule does not incorporate notions of biological gender determinism or sex stereotyping. In addition, the rule we fashion today we believe will encourage co-parenting in a marriage unlike the tender years doctrine which, for fathers, meant that whatever function they assumed in the rearing of their children would be deemed irrelevant in a custody contest.

Id.

concerned with the unfitness of the primary caretaker? Will there be a resurgence of the old arguments for gender neutrality?

It seems obvious that no simple phrase can describe the person who best fulfills the needs of an infant, nor should any single characteristic be so overwhelmingly important that it supersedes all others without any serious inquiry. Each child is a unique person who responds to different individuals and environments in her own way. For example, siblings may be totally different from each other although they may have been raised by the same parents in the same household.

Custody decisions about infants should focus first on the individual child and take into account such factors as the child's age, physical and emotional development, place in the family, attachments, special relationships, and individual needs. Next, an inquiry should be made into the circumstances surrounding the separation of the spouses and the characteristics of the custodian or custodians who can best fulfill the child's needs. The complexities inherent in human relationships make generalizations about them extremely difficult. Nevertheless, laws must be made to guide decision-makers who are confronted with a child custody dispute which the spouses themselves cannot resolve. Such laws should not be drafted simply to respond to generalizations but rather should leave room for flexibility as well as respect for the individuality of both the child and the person or persons who desire to care for that child.

There is no question that using a presumption in child custody disputes makes the judge's job easier, but too many human factors are ignored in such a process. The *Caucasian Chalk Circle* test was simple—too simple, actually—to use as a guideline for the "brute facts" of custody decisions.

Law reformers are constantly seeking magical solutions or formulas for determining who should be awarded custody in divorce cases. While mathematical formulas might work in determining child support payments, there are no such mechanical tests for child placement. The focus in child custody today should not be placed on searching for such tests, but rather on humanizing the process by which custody disputes are resolved. This requires the judge to approach each case with an open mind, apply the appropriate standards, and support the decision with specific reasons.

The process in divorce must be fair and the claimants must perceive it as such, otherwise parents may feel that either they are not receiving equal treatment or their individual voices are not being heard. When parents feel that they are treated indifferently, and the judge has failed to consider what parenthood has meant to them in the past, they may resist the decision. As a result, however, the child suffers. The treatment of children after divorce is

the ultimate test. No matter who is assigned custody—mother, father, or another adult—children need support, particularly psychological support. In the end, decisions about custody must be intimately connected with support and the ultimate goal of child custody must always be "that they may thrive."